

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION NO. 98-5268 (DMC)

NCH CORPORATION, NATIONAL  
CHEMSEARCH CORPORATION OF NEW  
JERSEY, INC., AMERICAN ALLSAFE  
CO., INC. d/b/a CERTIFIED  
LABORATORIES OF NEW JERSEY,  
INC., MOHAWK LABORATORIES OF  
NEW JERSEY, INC., or as a  
DIVISION OF NCH CORPORATION, FMC  
CORPORATION and LISBETH HIGGINS,

Defendants.

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIVIL ACTION NO. 01-0476 (JCL)

FMC CORPORATION, and  
LISBETH HIGGINS,

Defendants.

---

**CONSENT DECREE**

## TABLE OF CONTENTS

I.	HIGGINS FARM SUPERFUND SITE BACKGROUND .....	1
II.	HIGGINS DISPOSAL SUPERFUND SITE BACKGROUND .....	2
III.	JURISDICTION .....	3
IV.	PARTIES BOUND .....	4
V.	DEFINITIONS .....	4
VI.	GENERAL PROVISIONS .....	8
VII.	PERFORMANCE OF WORK BY SETTLING DEFENDANT AT HIGGINS FARM SITE .....	9
VIII.	REMEDY REVIEW AT HIGGINS FARM SITE .....	13
IX.	QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS .....	14
X.	ACCESS AND INSTITUTIONAL CONTROLS .....	15
XI.	REPORTING REQUIREMENTS AT HIGGINS FARM SITE .....	18
XII.	EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS .....	19
XIII.	PROJECT COORDINATORS FOR HIGGINS FARM SITE .....	20
XIV.	ASSURANCE OF ABILITY TO COMPLETE WORK AT HIGGINS FARM SITE .....	21
XV.	CERTIFICATION OF COMPLETION .....	22
XVI.	EMERGENCY RESPONSE FOR HIGGINS FARM SITE .....	25
XVII.	PAYMENTS OF RESPONSE COSTS .....	25
XVIII.	INDEMNIFICATION AND INSURANCE .....	29
XIX.	FORCE MAJEURE .....	30
XX.	DISPUTE RESOLUTION .....	32
XXI.	STIPULATED PENALTIES .....	34
XXII.	COVENANTS BY PLAINTIFF .....	38
XXIII.	COVENANTS BY SETTLING DEFENDANT AND SETTLING FEDERAL AGENCIES .....	42
XXIV.	EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION .....	44
XXV.	ACCESS TO INFORMATION .....	46
XXVI.	RETENTION OF RECORDS .....	47
XXVII.	NOTICES AND SUBMISSIONS .....	48
XXVIII.	EFFECTIVE DATE .....	49
XXIX.	RETENTION OF JURISDICTION .....	50
XXX.	APPENDICES .....	50
XXXI.	COMMUNITY RELATIONS AT HIGGINS FARM SITE .....	50
XXXII.	MODIFICATIONS .....	50
XXXIII.	LODGING AND OPPORTUNITY FOR PUBLIC COMMENT .....	51
XXXIV.	SIGNATORIES/SERVICE .....	51
XXXV.	FINAL JUDGMENT .....	52

## I. HIGGINS FARM SUPERFUND SITE BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), in 1998 filed a complaint, civil action number 98-5268 (DMC), pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, as amended. In May 1999, the United States filed an amended complaint.

B. The United States in its amended complaint, naming NCH Corporation and related entities ("Settling Defendant," as defined in this Consent Decree), FMC Corporation and Lisbeth Higgins as defendants, seeks: (1) reimbursement of response costs incurred by EPA and the Department of Justice for response actions at the Higgins Farm Superfund Site ("Higgins Farm"), in Franklin Township, Somerset County, New Jersey, together with accrued interest pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607; and (2) a declaration of liability for future response costs.

C. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Higgins Farm Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register in March, 1989.

D. On September 24, 1990, EPA issued a Record of Decision ("1990 ROD"). The 1990 ROD provided, as an interim remedy, the installation of an alternate water supply for certain residences near the Higgins Farm Site. By May 1993, the alternate water supply had been installed.

E. In response to a release or a substantial threat of a release of hazardous substances at or from the Higgins Farm Site, EPA conducted a Remedial Investigation and Feasibility Study ("RI/FS") for the permanent groundwater remedy at the Higgins Farm Site pursuant to 40 C.F.R. Part 300.430 from 1990 until 1992.

F. On September 30, 1992, EPA issued a second Record of Decision for Higgins Farm ("1992 ROD") (attached as Appendix A) that documents EPA's selection of a permanent remedial action for Higgins Farm. The remedial action selected in the 1992 ROD provided for the design and construction of an on-site extraction and treatment system for contaminated groundwater, with discharge of the treated groundwater to an on-site surface water body.

G. The design and construction of the treatment system occurred between February 1993 and May 1998. The treatment system at Higgins Farm commenced operations in May, 1998 and continues to operate.

H. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by Settling Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices.

I. For the purposes of Section 113(j) of CERCLA, the Remedial Action selected by

the ROD and the Work to be performed by Settling Defendant shall constitute a response action taken or ordered by the President.

## II. HIGGINS DISPOSAL SUPERFUND SITE BACKGROUND

J. On or about January 30, 2001, FMC Corporation filed a complaint seeking reimbursement for response actions it undertook at the Higgins Disposal Superfund Site ("Higgins Disposal") against a number of parties, including NCH Corporation and Lisbeth Higgins. FMC's lawsuit is civil action number 01-0476 (JCL).

K. The United States, on behalf of the EPA, in June 2001 filed a complaint pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, as amended, naming FMC and Lisbeth Higgins as defendants and seeking (1) reimbursement of response costs incurred by EPA and the Department of Justice for response actions at Higgins Disposal, in Kingston, Somerset County, New Jersey, together with accrued interest; and (2) a declaration of liability for future response costs. That lawsuit is civil action number 01-2946 (KSH).

L. During a scheduling conference on or about July 16, 2001, the Court consolidated civil action numbers 01-0476 (JCL) and 01-2946 (KSH). The controlling civil action number is 01-0476(JCL).

M. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Higgins Disposal Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, in August, 1990.

N. In response to a release or a substantial threat of a release of hazardous substances at or from Higgins Disposal, EPA conducted a Remedial Investigation and Feasibility Study ("RI/FS") for Higgins Disposal pursuant to 40 C.F.R. § 300.430 from 1992 through 1996.

O. On September 30, 1997, EPA issued a Record of Decision ("1997 ROD") that documents EPA's selection of a remedial action for Higgins Disposal. The remedial action selected in the 1997 ROD has two components. The first component involves the installation of an alternative water supply for the residents affected by the contaminated groundwater. The second component involves the construction of an on-site groundwater extraction system and pipeline to transmit the contaminated groundwater to the Higgins Farm Superfund Site for treatment. By September 1999, the alternate water supply had been installed.

P. On December 9, 2002, EPA issued an Explanation of Significant Differences ("2002 ESD") for Higgins Disposal. Pursuant to the 2002 ESD, the second component of the remedial action selected in the 1997 ROD has been changed to the installation of an on-site groundwater extraction and reinjection system.

Q. In a Partial Consent Decree entered by the Court on September 16, 2004, FMC Corporation agreed to design, construct and operate the on-site groundwater extraction and reinjection system for the Higgins Disposal Superfund Site as set forth in the 2002 ESD.

### BACKGROUND PERTAINING TO BOTH SITES:

R. In accordance with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP"), and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New Jersey (the "State") of negotiations with potentially responsible parties regarding the takeover of the operation and maintenance and any other future response work and payment of response costs at the Higgins Farm Site, and payment of response costs at the Higgins Disposal Site (the "Sites"), and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

S. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce on May 24, 2004, and the United States Department of Interior Fish and Wildlife Service on May 25, 2004, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship.

T. The defendant that has entered into this Consent Decree ("Settling Defendant") does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaints, nor does it acknowledge that the release or threatened release of hazardous substances at or from either Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment. The Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by Settling Defendant.

U. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of Higgins Farm and Higgins Disposal, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

### III. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant consents to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

#### IV. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

3. Settling Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendant with respect to the Higgins Farm Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day.

"Working day" shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

"DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

"Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 108.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Explanation of Significant Difference" or "ESD" shall mean the EPA Explanation of Significant Differences relating to the Higgins Disposal Site signed on December 9, 2002, by the Regional Administrator, EPA Region 2, or her delegate, and all attachments thereto.

"Future Oversight Costs" shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising Settling Defendant's performance of the Work at the Higgins Farm Site after the Effective Date to determine whether such performance is consistent with the requirements of this Consent Decree, including direct and indirect costs incurred in reviewing plans, reports and other documents and items submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work and verifying the Work, including, but not limited to, payroll costs, contractor costs, travel costs, and laboratory costs; however, Future Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to Sections VIII (Remedy Review), X (Access and Institutional Controls), XVI (Emergency Response), and Paragraph 87 of Section XXII (Work Takeover), or the costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XX (Dispute Resolution) and all litigation costs. Future Oversight Costs do not include oversight costs incurred by EPA with regard to the groundwater investigation performed pursuant to Paragraph 10 of this Consent Decree, which shall therefore be reimbursable as Future Response Costs pursuant to Paragraph 52 of this Consent Decree.

"Future Response Costs for Higgins Farm" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States will incur reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree after the Effective Date, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VIII, X (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XVI, and Paragraph 87 of Section XXII.

"Future Response Costs for Higgins Disposal" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States will pay for response actions at

Higgins Disposal after the Effective Date.

"Interim Response Costs for Higgins Farm" shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Higgins Farm Site between December 1, 2004 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Operation and Maintenance" or "O&M" shall mean all activities required to implement the Remedial Action at the Higgins Farm Site as required under the Operation and Maintenance Manual (O&M Manual) approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

"Parties" shall mean the United States and NCH Corporation.

"Past Response Costs for Higgins Farm" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Higgins Farm Site through November 30, 2004.

"Past Response Costs for Higgins Disposal" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Higgins Disposal Site through the Effective Date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action for the Higgins Farm Site selected in the 1992 ROD and Section II of the SOW.

"Plaintiff" shall mean the United States and the Environmental Protection Agency.



"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Higgins Farm Superfund Site, signed on September 30, 1992, by the Regional Administrator, EPA Region 2, or his/her delegate, and all attachments thereto.

"Remedial Action for the Higgins Farm Superfund Site" shall mean the remedial action selected by EPA for the Higgins Farm Superfund Site in the September 30, 1992 Record of Decision, in accordance with this Consent Decree and the Statement of Work.

"Remedial Action for the Higgins Disposal Superfund Site" shall mean the remedial action selected by EPA for the Higgins Disposal Superfund Site in the September 30, 1997 ROD and the 2002 ESD.

"Remedial Design" shall mean those activities undertaken by EPA to develop the final plans and specifications for the Higgins Farm Remedial Action selected in the September 30, 1992 Record of Decision.

"Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

"Settling Defendant" shall mean NCH Corporation, which has its principal place of business in Irving, Texas, National Chemsearch Corporation of New Jersey, American Allsafe Co., Certified Laboratories of New Jersey, Inc., and Mohawk Laboratories of New Jersey, Inc.

"Settling Federal Agencies" shall mean the Department of Energy, Department of Defense and General Services Administration which are resolving any claims which have been or could be asserted against them with regard to the Sites as provided in this Consent Decree.

"Sites" shall mean the Higgins Farm Superfund Site, located on Route 518 in Franklin Township, Somerset County, New Jersey, and generally shown on the map attached as Appendix B, the Higgins Disposal Superfund Site, located on Laurel Avenue, Kingston, Somerset County, New Jersey, and generally shown on the map attached as Appendix C, and all real property onto which or under which hazardous substances have migrated from these properties. The Higgins Farm Superfund Site is hereinafter referred to as "Higgins Farm." The Higgins Disposal Superfund Site is hereinafter referred to as "Higgins Disposal."

"State" shall mean the State of New Jersey.

"Statement of Work" or "SOW" shall mean the statement of work attached as

Appendix D, and any modifications to the SOW made in accordance with this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America, including all of its departments, agencies, and instrumentalities, which includes without limitation EPA, the Settling Federal Agencies and any federal natural resource trustee.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10, et seq.

"Work" shall mean all activities Settling Defendant is required to perform under this Consent Decree, except those required by Section XXVI (Retention of Records).

## VI. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Higgins Farm Site by providing for the implementation of operation and maintenance of the groundwater extraction/treatment/discharge system ("treatment system") at the Higgins Farm Site by the Settling Defendant, to investigate and perform future response action if necessary at the Higgins Farm Site, to reimburse response costs of the Plaintiff at both Sites, and to resolve the claims of Plaintiff against Settling Defendant and the claims of Settling Defendant which have been or could have been asserted against the United States with regard to both Sites as provided in this Consent Decree.

6. Commitments by Settling Defendant and Settling Federal Agencies. Settling Defendant shall finance and perform the Work at the Higgins Farm Site in accordance with this Consent Decree, the ROD, the SOW, and all manuals and plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also reimburse the United States for a portion of its Past Response Costs at both Sites, and for Future Response Costs at the Higgins Farm Site as provided in this Consent Decree. The Settling Federal Agencies shall reimburse the EPA Hazardous Substance Superfund for Past Response Costs and Future Response Costs at both Sites, and Settling Defendant for its future response costs, as provided in this Consent Decree.

7. Compliance with Applicable Law. All activities undertaken by Settling

Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or equivalencies.

b. Settling Defendant may seek relief under the provisions of Section XIX (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VII. PERFORMANCE OF WORK BY SETTLING DEFENDANT  
AT HIGGINS FARM SITE

9. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VII (Performance of the Work by Settling Defendant), VIII (Remedy Review), IX (Quality Assurance, Sampling and Data Analysis), and XVI (Emergency Response) of this Consent Decree shall be under the direction and supervision of one or more Supervising Contractor(s), the selection of which shall be subject to disapproval by EPA. Within ten (10) days after the lodging of this Consent Decree, Settling Defendant shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Settling Defendant shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by

EPA. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendant proposes to change a Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendant in writing. Settling Defendant shall submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to it within thirty (30) days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within twenty-one (21) days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XIX (Force Majeure) hereof.

10. Operation & Maintenance of the Groundwater Treatment System at the Higgins Farm Site and Groundwater Investigation

a. Prior to the lodging of this Consent Decree, Settling Defendant shall submit to EPA and the State a detailed Operation and Maintenance Manual ("O&M Manual"), which, upon its approval by EPA, shall be incorporated into the SOW attached to this Consent Decree. The O&M Manual shall be consistent with the SOW and provide for the continued implementation of the remedy selected in the 1992 ROD for the Higgins Farm Site. Upon its approval by EPA and incorporation into the SOW, the O&M Manual shall be incorporated into this Consent Decree and shall become enforceable under this Consent Decree upon its entry.

b. Prior to the lodging of this Consent Decree, Settling Defendant shall submit to EPA and the State a Health and Safety Plan for all field activities to be conducted, which conforms to the applicable Occupational Safety and Health Administration and EPA requirements, including but not limited to, 29 C.F.R. § 1910.120.

c. Prior to the lodging of this Consent Decree, Settling Defendant shall submit to EPA and the State a Quality Assurance Project Plan ("QAPP") and a Field Sampling Plan ("FSP") which, upon their approval by EPA, shall be incorporated into the SOW attached to this Consent Decree.

d. Within thirty (30) days of the lodging of the Consent Decree, Settling Defendant shall commence O&M activities in accordance with the requirements of the O&M Manual. Settling Defendant shall continue to implement the O&M of the treatment system at Higgins Farm until EPA determines that the Performance Standards for the remedy selected by the 1992 ROD, or as they may be modified by EPA in the future, are achieved and for so long thereafter as is otherwise required under this Consent Decree.

e. Prior to the lodging of this Consent Decree, Settling Defendant shall submit to EPA for review and approval an Investigation Work Plan ("IWP") that is consistent with the SOW for the investigation of any groundwater contamination that may have migrated beyond the Higgins Farm property borders. Upon its approval by EPA, and incorporation into the SOW, the IWP shall be incorporated into this Consent Decree and shall become enforceable under this Consent Decree upon its entry. The groundwater investigation required to be performed pursuant to this Paragraph 10.e, and any additional studies and/or response actions required to be performed pursuant to Paragraph 10.i, shall not include activities that may be necessary to address sources of groundwater contamination or sources of soil contamination that are discovered or defined after the Effective Date.

f. Within thirty (30) days of entry of this Consent Decree or EPA's approval of the IWP, whichever is later, Settling Defendant shall commence implementation of the requirements of the IWP.

g. Within forty-five (45) days after completing the activities required pursuant to the IWP, Settling Defendant shall submit to EPA, for review and approval pursuant to Section XII (EPA Approval of Plans and Other Submissions), a written investigatory report, that is consistent with the SOW, detailing all activities of the investigation of any groundwater contamination that may have migrated beyond the Higgins Farm property borders.

h. Within thirty (30) days of approval of the investigatory report by EPA, Settling Defendant shall submit to EPA a letter report providing Settling Defendant's recommendations with respect to the results of the IWP.

i. After review of the letter report, EPA may determine that additional studies and/or response actions are necessary to address any groundwater contamination that may have migrated beyond the Higgins Farm property borders. If EPA determines that additional studies, including but not limited to, feasibility studies, and/or response actions are necessary, Settling Defendant shall submit additional work plan(s) to EPA within forty-five (45) days of EPA's determination for review and approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Within fifteen (15) days of EPA's approval of the work plan(s), Settling Defendant shall implement the requirements of the work plan(s), in accordance with the SOW.

11. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed thereunder is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy selected in the 1992 ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the "scope of the remedy selected in the 1992 ROD" and any investigation and response actions required pursuant to Paragraph 10 of this Consent Decree.

b. For the purposes of this Paragraph 11, Paragraph 44, and Paragraph 45 only, the "scope of the remedy selected in the 1992 ROD" includes:

- (1) Installation of groundwater extraction wells around the perimeter of the site and the source areas;
- (2) Construction of an on-site treatment system to treat the contaminated groundwater;
- (3) Discharge of the treated groundwater to an on-site surface water body; and
- (4) Implementation of a sampling program involving monitoring wells to evaluate potential off-Site migration and the effectiveness of the groundwater extraction system.

c. EPA acknowledges that certain elements of the remedy as set forth in the 1992 ROD have been completed at the Higgins Farm Site and that operation and maintenance of the groundwater treatment system at the Higgins Farm Site is currently being performed.

d. If Settling Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XX (Dispute Resolution), Paragraph 65 (Record Review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

e. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

f. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions, including but not limited to the investigation, delineation and possible remediation of contaminated groundwater that may have migrated beyond the Higgins Farm property borders, as otherwise provided in this Consent Decree.

g. Settling Defendant may identify and request EPA's approval of modifications to the work Settling Defendant is required to perform as specified in the SOW and/or in work plans developed thereunder.

12. Settling Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, the work plans, or the Remedial Design or O&M Manual constitute a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the O&M Manual will achieve the Performance Standards.

13. a. Settling Defendant shall, prior to any off-Site shipment of Waste Material from the Higgins Farm Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards. Settling Defendant shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Settling Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Higgins Farm Site to an off-Site location, Settling Defendant shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. Settling Defendant shall only send hazardous substances, pollutants, or contaminants from the Higgins Farm Site to an off-Site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

#### VIII. REMEDY REVIEW AT HIGGINS FARM SITE

14. Periodic Review. The Settling Defendant shall conduct any studies and investigations as requested by EPA at the Higgins Farm Site, in order to permit EPA to conduct reviews of whether the Remedial Action at the Higgins Farm Site is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

15. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Remedial Action at the Higgins Farm Site is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

16. Opportunity To Comment. Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

#### IX. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

17. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all samples taken, in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001), "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendant of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the lodging of this Consent Decree, Settling Defendant shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a QAPP that is consistent with the SOW, the NCP and applicable guidance documents. Upon its approval by EPA, the QAPP shall be incorporated into the SOW attached to this Consent Decree. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendant shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendant in implementing this Consent Decree. In addition, Settling Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendant shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" (OLM 04.2) or the latest revision, and the "Contract Lab Program Statement of Work for Organic Analysis," (ILM04.0) or the latest revision, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA, after opportunity for review and comment by the State, Settling Defendant may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Settling Defendant shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendant shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as



meeting the Quality System requirements. Settling Defendant shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

18. Upon request, Settling Defendant shall allow split or duplicate samples to be taken by EPA or their authorized representatives. Settling Defendant shall notify EPA not less than twenty-eight (28) days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples. Upon request, EPA shall allow Settling Defendant to take split or duplicate samples of any samples it takes as part of EPA's oversight of Settling Defendant's implementation of the Work at the Higgins Farm Site.

19. Settling Defendant shall submit to EPA two (2) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the Higgins Farm Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

20. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

#### X. ACCESS AND INSTITUTIONAL CONTROLS

21. If the Higgins Farm property, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than the Settling Defendant, Settling Defendant shall use best efforts to secure from such persons:

a. an agreement to provide access at all reasonable times for Settling Defendant, as well as the United States and its representatives, including EPA and its representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree, including, but not limited to the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations relating to contamination at or near the Higgins Farm Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Higgins Farm Site;
- (6) Assessing implementation of quality assurance and quality control

practices as defined in the approved Quality Assurance Project Plan;

- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 87 of this Consent Decree;
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXV (Access to Information);
- (9) Assessing Settling Defendant's compliance with this Consent Decree; and
- (10) Determining whether the Higgins Farm Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. an agreement, enforceable by Settling Defendant and the United States, to refrain from using the Higgins Farm property, or any other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree; and

c. upon request by EPA, execute and record in the Clerk's Office of Somerset County, State of New Jersey, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 21.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions EPA determines are required by Paragraph 21.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. The access rights and/or the rights to enforce land/water use restrictions shall be granted to (i) the United States, on behalf of EPA, and its representatives, (ii) Settling Defendant and its representatives, and/or (iii) other appropriate grantees as determined by EPA. If EPA so requests, Settling Defendant shall, within forty-five (45) days of EPA's request, submit to EPA for review and approval with respect to such property:

- (1) A draft easement, in substantially the form attached hereto as Appendix E, that is enforceable under the laws of the State of New Jersey, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and
- (2) a current title insurance commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in land Acquisitions by the United

States (1970)(the "Standards").

Within fifteen (15) days of EPA's written approval and acceptance of the easement, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Clerk's Office of Somerset County, New Jersey. Within thirty (30) days of recording the easement, Settling Defendant shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

22. Once Settling Defendant determines access agreements pursuant to Paragraph 21.a are required, Settling Defendant shall notify EPA in writing of the date it first attempts to obtain such access. If (a) any access agreements required by Paragraphs 21.a of this Consent Decree are not obtained within forty-five (45) days of the date Settling Defendant first attempted to obtain such access, (b) any land/water use restriction agreements required by Paragraph 21.b of this Consent Decree are not obtained within forty-five (45) days after EPA determines that land/water use restrictions agreements are required, or (c) any access easements or restrictive easements required by Paragraph 21.c of this Consent Decree are not submitted to EPA in draft form within forty-five (45) days of EPA's request, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 21 of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendant in obtaining access and/or land/water use restrictions (either in the form of contractual agreements or in the form of easements running with the land). Settling Defendant shall reimburse the United States in accordance with the procedures in Section XVII (Payments of Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access and/or land/water use restrictions and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid for just compensation.

23. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to operate and maintain the remedy selected in the ROD for the Higgins Farm Site, ensure the integrity and protectiveness of the remedy selected in the ROD for the Higgins Farm Site, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's efforts to secure such governmental controls.

24. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

## XI. REPORTING REQUIREMENTS AT HIGGINS FARM SITE

25. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to EPA and the State two (2) copies of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendant or their contractors or agents in the previous month; (c) identify all manuals, work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of manuals or work plans, which are scheduled for the next six (6) weeks and provide other information relating to the progress of construction (if any), including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding any unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the manuals, work plans or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Settling Defendant shall submit the first progress report required by this Paragraph thirty days after Settling Defendant commences operation of the treatment plant, and all other progress reports to EPA and the State must be sent by the 10th day of every month thereafter until EPA notifies Settling Defendant pursuant to Paragraph 45.b of Section XV (Certification of Completion). If requested by EPA, Settling Defendant shall also provide briefings for EPA to discuss the progress of the Work.

26. Settling Defendant shall notify EPA of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of manuals or work plans, no later than seven (7) days prior to the performance of the activity.

27. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Remedial Project Manager ("RPM") who will serve as EPA's Project Coordinator for Higgins Farm, or, in the event that the EPA RPM is unavailable, contact the EPA Region 2 spill line at 1-800-424-8802 or (732) 321-4370. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

28. Within twenty (20) days of the onset of such an event, Settling Defendant shall furnish to EPA a written report, signed by Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within

thirty (30) days of the conclusion of such an event, Settling Defendant shall submit a written report setting forth all actions taken in response thereto.

29. Settling Defendant shall submit two (2) copies of all manuals, plans, reports, and data required by the SOW, the O&M Manual, the IWP, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendant shall simultaneously submit one (1) copy of all such manuals, plans, reports and data to the State. Upon request by EPA, Settling Defendant shall submit in electronic form acceptable to EPA all portions of any report or other deliverable the Settling Defendant is required to submit pursuant to the provisions of this Consent Decree.

30. All reports and other documents submitted by Settling Defendant to EPA (other than the monthly progress reports referred to above) which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant.

## XII. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

31. After review of the O&M Manual, the IWP or any other plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within twenty (20) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

32. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 31.a, b, or c, Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 31.c and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXI (Stipulated Penalties).

33. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 31.d, Settling Defendant shall, within twenty (20) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXI, shall accrue during the twenty (20)-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 34 and 35.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 31.d, Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XXI (Stipulated Penalties).

34. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendant shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XX (Dispute Resolution).

35. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendant shall be deemed to have failed to submit such plan, report, or item timely and adequately unless Settling Defendant invokes the dispute resolution procedures set forth in Section XX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XX (Dispute Resolution) and Section XXI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXI.

36. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XIII. PROJECT COORDINATORS FOR HIGGINS FARM SITE

37. Within five (5) days of lodging this Consent Decree, Settling Defendant will

notify EPA, in writing, of the name, address and telephone number of its designated Project Coordinator. The Remedial Project Manager ("RPM") for the Higgins Farm Site will serve as EPA's Project Coordinator for the Higgins Farm Site. If a Project Coordinator initially designated is changed, the identity of the successor will be given to the other Party at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. He or she may assign other representatives, including other contractors, to serve as a Higgins Farm Site representative for oversight of performance of daily operations during remedial activities.

38. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's RPM at Higgins Farm, who serves as the Project Coordinator, shall have the authority lawfully vested in a RPM and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's RPM shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Higgins Farm Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

39. EPA's RPM and Settling Defendant's Project Coordinator will meet on an "as needed" basis.

#### XIV. ASSURANCE OF ABILITY TO COMPLETE WORK AT HIGGINS FARM SITE

40. Within fifteen (15) days of the lodging of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of \$15 million in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work at Higgins Farm;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work at the Higgins Farm Site;
- c. A trust fund;
- d. A demonstration that Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f). For the purposes of this section only, references in 40 C.F.R. 264.143 (f) to the "sum of current closure and post-closure costs estimates and the current plugging and

abandonment costs estimates" shall mean \$15 million; and/or

e. A policy of insurance by an insurance carrier acceptable in all respects to the U.S. which ensures the payment and/or performance of the Work at Higgins Farm.

41. If Settling Defendant seeks to demonstrate its ability to complete the Work by means of the financial test pursuant to Paragraph 40.d, Settling Defendant shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 40 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work at Higgins Farm shall not excuse performance of any activities required under this Consent Decree.

42. If Settling Defendant can show that the estimated cost to complete the remaining Work at Higgins Farm has diminished below the amount set forth in Paragraph 40 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

43. Settling Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XV. CERTIFICATION OF COMPLETION

44. Completion of the Remedial Action.

a. After Settling Defendant concludes that the Remedial Action (including O&M and the groundwater investigation) has been fully performed and the Performance Standards have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by EPA and the State. If, after the pre-certification inspection, Settling Defendant still believes that the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit the "Final Remedial Action Report" referenced in Section VII of the SOW requesting certification to EPA for approval, with a copy to the State,



pursuant to Section XII (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a New Jersey State-licensed professional engineer and Settling Defendant's Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include all appropriate data relating to the Remedial Action including annual data summaries for the operation and maintenance; for each Performance Standard, a description of the Standard, the basis for determining that the Standard is met, the location and frequency of the tests, and the results of confirmatory sampling locations and sampling depths. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Remedial Action and to achieve the Performance Standards. Provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the 1992 ROD," as that term is defined in Paragraph 11.b, and any investigation and response actions required pursuant to Paragraph 10 of this Consent Decree. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of the Remedial Action and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendant. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not

limited to, Section XXII (Covenants Not to Sue by Plaintiff). Certification of Completion of the Remedial Action shall not affect Settling Defendant's obligations under this Consent Decree.

45. Completion of the Work.

a. After Settling Defendant concludes that all phases of the Work for the Higgins Farm Site have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by EPA and the State. If, after the pre-certification inspection, Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit the "Completion Report" referenced in Section XI of the SOW by a New Jersey State-licensed professional engineer stating that the Work for the Higgins Farm Site has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the Completion Report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Work for the Higgins Farm Site. Provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the 1992 ROD," as that term is defined in Paragraph 11.b, and any investigation and response actions required pursuant to Paragraph 10 of this Consent Decree. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require Settling Defendant to submit a schedule to EPA for approval pursuant to Section XII (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work by Settling Defendant and after a reasonable opportunity for review and comment by the State, that the Work has been performed in

accordance with this Consent Decree, EPA will so notify Settling Defendant in writing.

#### XVI. EMERGENCY RESPONSE FOR HIGGINS FARM SITE

46. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Higgins Farm Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 47, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA RPM for the Higgins Farm Site, or, if the RPM is unavailable, contact the EPA Region 2 spill line at 1-800-424-8802 or (732) 321-4370. Settling Defendant shall take such actions in consultation with the EPA RPM at Higgins Farm and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendant shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVII (Payments of Response Costs).

47. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States a) to take any action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Higgins Farm Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Higgins Farm Site, subject to Section XXII (Covenants by Plaintiff).

#### XVII. PAYMENTS OF RESPONSE COSTS

48. Payments by Settling Defendant for Past Response Costs at Both Sites and Payment by Settling Defendant for Interim Response Costs at Higgins Farm Site

a. Within thirty (30) days of the Effective Date, Settling Defendant shall pay to EPA \$1,000,000.00, in payment for Past Response Costs for the Higgins Farm Site. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1998-v-02168, EPA Site/Spill ID Number 02-W9, and DOJ Case Number 90-11-3-1486/1. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Jersey following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

b. Within thirty (30) days of the Effective Date, Settling Defendant shall pay to EPA \$500,000.00 in payment for Past Response Costs and Future Response Costs for the

Higgins Disposal Site. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2001-v-00202, EPA Site/Spill ID Number 02-3C, and DOJ Case Number 90-11-3-1486/2. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Jersey following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

c. Within thirty (30) days of the Effective Date, Settling Defendant shall pay to EPA \$565,000.00 in satisfaction of its obligation to pay Interim Response Costs for the Higgins Farm Site. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1998-v-02168, EPA Site/Spill ID Number 02-W9, and DOJ Case Number 90-11-3-1486/1. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Jersey following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

d. At the time of payment, Settling Defendant shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVII (Notices and Submissions).

e. Of the total amount to be paid to the United States by Settling Defendant pursuant to Subparagraphs 48.a, b and c, \$1,000,000.00 shall be deposited into the Higgins Farm Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Higgins Farm Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund, and \$1,065,000.00 shall be deposited in the EPA Hazardous Substance Superfund.

f. In the event that payments required by Subparagraphs 48.a, b and c are not made within thirty (30) days of the Effective Date, Interest on the unpaid balance shall be paid, commencing on the Effective Date and accruing through the date of the payment.

g. If Settling Defendant does not execute and return this Consent Decree to DOJ by June 23, 2006, Interest on the \$2,065,000.00 shall be paid, commencing on June 23, 2006 and accruing through the date of the payment.

49. Payments by Settling Federal Agencies. As soon as reasonably practicable after the Effective Date, and consistent with Subparagraph 49.a.iii, the United States, on behalf of the Settling Federal Agencies, shall:

- a.
  - (i) Pay to the EPA Hazardous Substance Superfund \$2,800,000.00 in reimbursement of Past Response Costs at the Higgins Farm Site;
  - (ii) Pay to the EPA Hazardous Substance Superfund \$4,500,000.00 in reimbursement of Past Response Costs and Future Response Costs at the Higgins Disposal Site;
  - (iii) If the payment to the EPA Hazardous Substances Superfund required by this subparagraph is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Consent Decree, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

b. Pay to the Settling Defendant \$2,000,000.00 in reimbursement of Settling Defendant's undertaking the Work at the Higgins Farm Site and for future response costs, in the form of a check or checks made payable to NCH Corporation and sent to Michael J. Near, Regulatory Affairs Counsel of NCH, or by Electronic Funds Transfer in accordance with instructions provided by Settling Defendant.

50. In the event that payments required by Paragraph 49.b are not made within thirty (30) days of the Effective Date, interest on the unpaid balance shall be paid, commencing on the Effective Date and accruing through the date of the payment.

51. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

52. Payment for Future Response Costs at Higgins Farm Site by Settling Defendant.

a. Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan incurred for the Higgins Farm Site, except Future Oversight Costs. The United States will send Settling Defendant a bill requiring payment that includes an EPA SCORPIOS cost summary and a DOJ cost summary, setting forth direct and indirect costs incurred by EPA, DOJ, and their contractors on a periodic basis. Bills requiring payment for oversight of the groundwater investigation shall include only costs incurred by EPA and not the costs of its contractors. Settling Defendant shall make all payments

within thirty (30) days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 53.

b. At the time of payment, Settling Defendant shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVII (Notices and Submissions).

c. Payments shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1998-v-02168, EPA Site/Spill ID Number 02-W9, and DOJ Case Number 90-11-3-1486/1. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of New Jersey following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

53. Settling Defendant may contest payment of any Future Response Costs under Paragraph 52 if it determines that the United States has made a mathematical error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within thirty (30) days of receipt of the bill and must be sent to the United States pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Defendant shall within the thirty (30) day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 54. Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New Jersey and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendant shall send to the United States, as provided in Section XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Settling Defendant shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States prevails in the dispute, within five (5) days of the resolution of the dispute, Settling Defendant shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 52. If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 52; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the

procedures set forth in Section XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

54. In the event that the payments required by Paragraph 48 are not made within thirty (30) days of the Effective Date or the payments required by Paragraph 52 and 53 (for contested costs) are not made or escrowed within thirty (30) days of Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs and Interim Response Costs under Paragraph 48 shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 69. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 52.

#### XVIII. INDEMNIFICATION AND INSURANCE

##### 55. Settling Defendant's Indemnification of the United States.

a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representative for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, Settling Defendant agrees to pay the United States (with the exception of the Settling Federal Agencies) all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendant nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Settling Defendant notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 55, and shall

consult with Settling Defendant prior to settling such claim.

56. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Higgins Farm Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Higgins Farm Site, including, but not limited to, claims on account of construction delays.

57. No later than fifteen (15) days before commencing any on-site Work, Settling Defendant shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 44.b of Section XV (Certification of Completion) comprehensive general liability insurance with limits of \$1 million dollars, combined single limit, and automobile liability insurance with limits of \$1 million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Settling Defendant shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### XIX. FORCE MAJEURE

58. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2)



following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

59. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Settling Defendant shall notify orally EPA's RPM at Higgins Farm or, in his or her absence, the Chief of the New Jersey Remediation Branch of the Emergency and Remedial Response Division (ERRD), EPA Region 2, within forty-eight (48) hours of when Settling Defendant first knew that the event might cause a delay. Within five (5) days thereafter, Settling Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Settling Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

60. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Settling Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

61. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 58 and 59, above. If Settling Defendant carries this burden, the delay at issue shall

be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

## XX. DISPUTE RESOLUTION

62. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

63. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

### 64. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 65 or Paragraph 66.

b. Within thirty (30) days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 65 or 66. Within ten (10) days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under Paragraph 65 or 66, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court

shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 65 or 66.

65. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Emergency and Remedial Response Division ("ERRD"), EPA Region 2, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 65.a. This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 65.c and d.

c. Any administrative decision made by EPA pursuant to Paragraph 65.b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Emergency and Remedial Response Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 65.a.

66. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendant's Statement of Position submitted

pursuant to Paragraph 64, the Director of ERRD, Region 2, will issue a final decision resolving the dispute. The Director's decision shall be binding on Settling Defendant unless, within ten (10) days of receipt of the decision, Settling Defendant files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendant's motion.

b. Notwithstanding Paragraph I of Section I (Higgins Farm Superfund Site Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

67. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendant under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Any invocation of dispute resolution by Settling Defendant with respect to Paragraph VII.B of the SOW does not relieve Settling Defendant of its obligation to continue operation of the O&M system. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 76. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXI (Stipulated Penalties).

## XXI. STIPULATED PENALTIES

68. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 69 and 70 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XIX (Force Majeure). "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

### 69. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 69.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000.00	1st through 14th day
\$2,500.00	15th through 30th day
\$5,000.00	31st day and beyond

b. Compliance Milestones.

- i. timely submission of payments pursuant to Paragraph 48.a and b;
- ii. Financial Assurance requirements pursuant to Section XIV;
- iii. timely submission of the name, title, and qualifications of proposed Supervising Contractor pursuant to Paragraph 9;
- iv. timely submission of written notification of any off-Site shipment of Waste Material from the Higgins Farm Site to an out-of-state waste management facility pursuant to Paragraph 13;
- v. timely submission of the name of the Project Coordinator pursuant to Section XIII;
- vi. Certification of Completion requirements set forth in Section XV;
- vii. timely submission of written notification regarding delays or anticipated delays, consistent with Paragraph 59;
- viii. indemnification and insurance requirements set forth in Section XVIII;
- ix. quality assurance, sampling, data analysis, and other requirements set forth in Section IX;
- x. reporting requirements set forth in Section XI; and
- xi. submission of documents and other information in accordance with Section XXV.

70. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to the SOW and Paragraphs 10, 25, 28, 29, 44 and 45 of the Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000.00	1st through 14th day
\$2,500.00	15th through 30th day
\$5,000.00	31st day and beyond

71. In the event that EPA assumes performance of a portion or all of the Work at the Higgins Farm Site pursuant to Paragraph 87 of Section XXII (Covenants By Plaintiff), Settling Defendant shall be liable for a stipulated penalty in the amount of \$1,500,000.00.

72. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XII (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Director of the ERRD, EPA Region 2, under Paragraph 65.b or 66.a of Section XX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; (3) with respect to judicial review by this Court of any dispute under Section XX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute; or (4) with respect to judicial review by an appellate court, during the period, if any, beginning on the 31<sup>st</sup> day after the appellate court's receipt of the Parties' appellate briefs until the date that the appellate court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

73. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendant written notification of the same and describe the noncompliance. EPA may send Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Settling Defendant of a violation.

74. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XX (Dispute Resolution). All payments to the United States under this Section shall be remitted via Electronic Fund Transfer ("EFT"), along with the following information, to EPA's Account with Mellon Bank, Pittsburgh, Pennsylvania:

- (i) Amount of Payment
- (ii) Title of Mellon Bank account to receive the Payment: **EPA**
- (iii) Account code for Mellon Bank account receiving the payment: **9108544**
- (iv) Mellon Bank Routing Number: **0430000261**
- (v) Name of Party making payment
- (vi) DOJ Case Numbers: **90-11-3-1486/1** (Higgins Farm) and **90-11-3-1486/2** (Higgins Disposal)
- (vii) Site Spill Identifier Nos. **02-W9** (Higgins Farm) and **02-3C** (Higgins Disposal)

At the time of the EFT, a letter shall be sent by Settling Defendant indicating that the payment is for stipulated penalties, and referencing the EPA Region 2 Site/Spill ID 02-W9 (Higgins Farm) and 02-3C (Higgins Disposal), the DOJ Case Numbers 90-11-3-1486/1 (Higgins Farm) and 90-11-3-1486/2 (Higgins Disposal), and the name and address of the party making payment. The letter shall be sent to the United States as provided in Section XXVII (Notices and Submissions).

75. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

76. Penalties shall continue to accrue as provided in Paragraph 72 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within fifteen (15) days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within thirty (30) days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendant to the extent that it prevails.

77. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 74.

78. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

79. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

## XXII. COVENANTS BY PLAINTIFF

80. Settling Defendant. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 82, 83 and 86 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. § 9606 and 9607(a), relating to the Sites. Except with respect to future liability at the Higgins Farm Site, these covenants not to sue shall take effect for Settling Defendant upon the receipt by EPA of the payments required by Paragraph 48.a, b and c of Section XVII (Payments for Response Costs). With respect to future liability at the Higgins Farm Site, these covenants not to sue shall take effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 44.b of Section XV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to Settling Defendant and do not extend to any other person.

81. Settling Federal Agencies. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of the Consent Decree, and except as specifically provided in Paragraphs 82, 83 and 86 of this Section, EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA relating to the Sites. EPA's covenant shall take effect upon the receipt of the payments required by Paragraph 49.a.i and ii of Section XVI (Payments of Response Costs). EPA's covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. EPA's covenant extends only to the Settling Federal Agencies and does not extend to any other person.



82. United States' Pre-certification Reservations

a. As to the Higgins Farm Site. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies,

1. to perform further response actions relating to Higgins Farm, or
2. to reimburse the United States for additional costs of response

if, prior to Certification of Completion of the Remedial Action for the Higgins Farm Superfund Site:

- (i) conditions at Higgins Farm, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action for the Higgins Farm Superfund Site is not protective of human health or the environment.

b. As to the Higgins Disposal Site. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies,

1. to perform further response actions relating to Higgins Disposal, or
2. to reimburse the United States for additional costs of response

if, prior to Certification of Completion of the Remedial Action for the Higgins Disposal Superfund Site:

- (i) conditions at Higgins Disposal, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or information together with any

other relevant information indicates that the Remedial Action for the Higgins Disposal Superfund Site is not protective of human health or the environment.

83. United States' Post-certification Reservations.

a. As to the Higgins Farm Site. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies,

1. to perform further response actions relating to Higgins Farm, or
2. to reimburse the United States for additional costs of response,

if, subsequent to Certification of Completion of the Remedial Action for the Higgins Farm Superfund Site:

- (i) conditions at Higgins Farm, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action for the Higgins Farm Superfund Site is not protective of human health or the environment.

b. As to the Higgins Disposal Site. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies,

1. to perform further response actions relating to Higgins Disposal, or
2. to reimburse the United States for additional costs of response,

if, subsequent to Certification of Completion of the Remedial Action for the Higgins Disposal Superfund Site:

- (i) conditions at Higgins Disposal, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action for the Higgins Disposal Superfund Site is not protective of human health or the environment.

84. For purposes of Paragraph 82.a and 83.a, the information and the conditions known to EPA relating to the Higgins Farm Site shall include that information and those conditions known to EPA through the Effective Date, including, but not limited to, the information and conditions set forth in the October 2003 Higgins Farm Superfund Site Five-Year Review, the October 22, 1999 Remedial Action Report, the September 30, 1992 Record of Decision, the September 24, 1990 Record of Decision, and the May 2004 Remediation System Evaluation Report. For purposes of Paragraph 82.b, the information and conditions known to EPA relating to the Higgins Disposal Site shall include only that information and those conditions known to EPA as of the date the ESD for the Higgins Disposal Site was signed and set forth in the ESD and the administrative record supporting the ESD.

85. For the purposes of Paragraph 83.a the known information and the known conditions relating to the Higgins Farm Site shall include the information and conditions as described in Paragraph 84 and that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action for the Higgins Farm Superfund Site. For purposes of Paragraph 83.b the information and the conditions known to EPA relating to the Higgins Disposal Site shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action for the Higgins Disposal Superfund Site and set forth in the ESD, the administrative record supporting the ESD or in any information received by EPA prior to Certification of Completion of the Remedial Action for the Higgins Disposal Superfund Site.

86. General reservations of rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant, and EPA and the Federal Natural Resources Trustees reserve, and this Consent Decree is without prejudice to, all rights against the Settling Federal Agencies, with respect to all matters not expressly included within Plaintiff's covenants. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant, and EPA and the Federal Natural Resources Trustees reserve, and this Consent Decree is without prejudice to, all rights against the Settling Federal Agencies, including, but not limited to:

- a. claims based on a failure by Settling Defendant or the Settling Federal Agencies to meet a requirement of this Consent Decree;

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Sites;

c. liability based upon Settling Defendant's ownership or operation of either Site, or upon Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Sites, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by Settling Defendant;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

e. criminal liability;

f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

g. liability for costs that the United States will incur related to the Higgins Farm Site that are not within the definition of Future Response Costs.

87. Work Takeover at Higgins Farm Site. In the event EPA determines that Settling Defendant has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendant may invoke the procedures set forth in Section XX (Dispute Resolution), Paragraph 65, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVII (Payments of Response Costs).

88. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions, including any response actions determined to be necessary by EPA as a result of the groundwater investigation pursuant to Paragraph 10.i, authorized by law.

### XXIII. COVENANTS BY SETTLING DEFENDANT AND SETTLING FEDERAL AGENCIES

89. Covenant Not to Sue by Settling Defendant. Subject to the reservations in

Paragraph 91, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to either Site or this Consent Decree, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
- b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to either Site, or
- c. any claims arising out of response actions at or in connection with either Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 94 (Waiver of Claims Against Certain Parties) and Paragraph 99 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Section XXII (Covenants By Plaintiff), but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

90. Covenant by Settling Federal Agencies. Settling Federal Agencies hereby agree not to assert any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to the Sites or this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under the National Contingency Plan (40 C.F.R. Part 300).

91. Settling Defendant reserves, and this Consent Decree is without prejudice to:

- a. Claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendant's plans or activities. The foregoing

applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA; and

b. Claims against the United States seeking to recover a portion of any judgment against Settling Defendant, if and only if Settling Defendant's claims meet the following conditions:

- i. The claim must be based upon the Department of Energy's involvement in the COED project at FMC Corporation's Princeton, New Jersey facility;
- ii. The claim must be for a portion of Settling Defendant's liability (including potential liability) at one or both of the Sites; and
- iii. The claim or judgment must emerge from an action brought by the State of New Jersey relating to one or both of the Sites.

92. Settling Defendant agrees that it shall not seek either partial or complete reimbursement from the United States, pursuant to any contract or agreement between Settling Defendant and a department, agency, or instrumentality of the United States, of any costs paid or reimbursed by the United States to Settling Defendant pursuant to this Consent Decree, including without limitation, by including such sums in overhead or indirect costs otherwise allocable to the United States under such contract or agreement.

93. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

94. **Waiver of Claims Against Certain Parties for Higgins Farm Site**

Settling Defendant agrees not to assert any claims and to release or waive all claims or causes of action that it may have for all matters relating to the Higgins Farm Site, including for contribution, against Shell Chemical Company and Firmenich, Inc. under CERCLA. This waiver shall not apply with respect to any defense, claim, or cause of action Settling Defendant may have against Shell Corporation or Firmenich if they assert a claim or cause of action relating to the Higgins Farm Site against Settling Defendant.

**XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

95. Except as provided in Paragraph 94 (Waiver of Claims Against Certain Parties),

nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraph 94 (Waiver of Claims Against Certain Parties), each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Sites against any person not a Party hereto.

96. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant and the Settling Federal Agencies are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, or any other person with respect to the Sites. The "matters addressed" in this settlement do not include those response costs or response actions which are or may be the subject of Paragraph 82, Paragraph 83 and Paragraph 86 of this Consent Decree; those response costs or response actions at the Higgins Farm Site to address sources of groundwater contamination or sources of soil contamination which were not known information or known conditions as identified in Paragraph 84; or claims for failure to comply with this Consent Decree.

97. Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify the United States in writing no later than thirty (30) days prior to the initiation of such suit or claim.

98. Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it after the Effective Date, for matters related to this Consent Decree it will notify in writing the United States within twenty (20) days of service of the complaint on it. In addition, Settling Defendant shall notify the United States within ten (10) days of service or receipt of any Motion for Summary Judgment and within twenty (20) days of receipt of any order from a court setting a case for trial.

99. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to one or both Sites, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, the entire controversy doctrine or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants set forth in Section XXII (Covenants by Plaintiff).

## XXV. ACCESS TO INFORMATION

100. Settling Defendant shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Sites or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### 101. Business Confidential and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Defendant.

b. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated to satisfy the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

102. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around either Site.



## XXVI. RETENTION OF RECORDS

103. Until ten (10) years after Settling Defendant's receipt of EPA's notification pursuant to Paragraph 45.b of Section XV (Certification of Completion), Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to either Site. Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

104. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has certified that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

105. After the conclusion of this document retention period, Settling Defendant shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated to satisfy the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

106. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding either Site since notification of potential liability by the United States or the State or the filing of suit against it regarding either Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. 6927.

## XXVII. NOTICES AND SUBMISSIONS

107. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the Settling Federal Agencies, and Settling Defendant, respectively.

### As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-3-1486/1 and 90-11-3-1486/2

and

Chief, Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Re: DJ # 90-11-6-06003

### As to EPA:

Director, Emergency and Remedial Response Division  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

Pamela J. Baxter  
EPA Project Coordinator – Higgins Farm Site  
U.S. Environmental Protection Agency

Region 2  
290 Broadway  
New York, New York 10007-1866

ATTN: Higgins Disposal Remedial Project Manager  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

ATTN: Higgins Farm and Higgins Disposal Superfund Site Attorney  
U.S. Environmental Protection Agency – Region 2  
Office of Regional Counsel  
290 Broadway, 17<sup>th</sup> Floor  
New York, New York 10007-1866

As to the Regional Financial Management Officer:

Chief, Financial Management Branch  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

As to the Settling Defendant:

Settling Defendant's Project Coordinator:  
John P. McBurney  
De Maximis, Inc.  
186 Center Street  
Suite 290  
Clinton, NJ 08809

Michael J. Near  
Regulatory Affairs Counsel  
NCH Corporation  
2727 Chemsearch Boulevard  
Irving, Texas 75062

XXVIII. EFFECTIVE DATE

108. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

#### XXIX. RETENTION OF JURISDICTION

109. This Court retains jurisdiction over both the subject matter of this Consent Decree and Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XX (Dispute Resolution) hereof.

#### XXX. APPENDICES

110. The following appendices are attached to and incorporated into this Consent Decree:

- "Appendix A" is the September 30, 1992 Record of Decision for the Higgins Farm Site
- "Appendix B" is the map of the Higgins Farm property
- "Appendix C" is the map of the Higgins Disposal property
- "Appendix D" is the SOW and all appendices attached thereto
- "Appendix E" is the draft easement referenced herein in Section X

#### XXXI. COMMUNITY RELATIONS AT HIGGINS FARM SITE

111. If requested by EPA, Settling Defendant shall propose to EPA its participation in the community relations plan to be developed by EPA, if any, with respect to the Higgins Farm Site. EPA will determine the appropriate role for Settling Defendant under the Plan. Settling Defendant shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Higgins Farm Site.

#### XXXII. MODIFICATIONS

112. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and Settling Defendant. All such modifications shall be made in writing.

113. Except as provided in Paragraph 11 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendant, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R.

300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R.300.435(c)(2)(B)(ii), may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendant.

114. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

### XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

115. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

116. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

### XXXIV. SIGNATORIES/SERVICE

117. The undersigned representative of Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

118. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

119. Settling Defendant hereby agrees not to oppose entry of the Consent Decree, or to challenge any provision of the Consent Decree involving FMC Corporation.

120. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal

service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXV. FINAL JUDGMENT

121. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

122. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, Settling Defendant, and the Settling Federal Agencies. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 2006.

---

DENNIS M. CAVANAUGH  
United States District Judge

---

JOHN C. LIFLAND  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. NCH Corporation, et al., Civil Action No. 98-5268 (DMC) and United States v. FMC Corporation and Lisbeth Higgins, Civil Action No. 01-0476 (JCL) relating to the Higgins Farm and Higgins Disposal Superfund Sites.

FOR THE UNITED STATES OF AMERICA

DATED: \_\_\_\_\_

SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

DATED: August 4, 2006

\_\_\_\_\_  
MYLES E. FLINT, II  
PATRICIA A. MCKENNA  
SCOTT D. BAUER  
KATHERINE KANE  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

DATED: August 4, 2006

\_\_\_\_\_  
MICHAEL ROWE  
Environmental Defense Section  
Environment and Natural resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

CHRISTOPHER J. CHRISTIE  
United States Attorney  
District of New Jersey

SUSAN STEELE  
Assistant United States Attorney  
District of New Jersey  
970 Broad Street, Suite 700  
Newark, New Jersey 07102



THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. NCH Corporation, et al., Civil Action No. 98-5268 (DMC) and United States v. FMC Corporation and Lisbeth Higgins, Civil Action No. 01-0476 (JCL) relating to the Higgins Farm and Higgins Disposal Superfund Sites.

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

DATED: 6/20/06

\_\_\_\_\_  
GEORGE PAVLOU  
Director  
Emergency and Remedial Response Division  
Region 2  
U.S. Environmental Protection Agency  
290 Broadway  
New York, New York 10007-1866

DATED: June 19, 2006

\_\_\_\_\_  
DEBORAH SCHWENK  
Assistant Regional Counsel  
Region 2  
U.S. Environmental Protection Agency  
290 Broadway  
New York, New York 10007-1866

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. NCH Corporation, et al., Civil Action No. 98-5268 (DMC) and United States v. FMC Corporation and Lisbeth Higgins, Civil Action No. 01-0476 (JCL) relating to the Higgins Farm and Higgins Disposal Superfund Sites.

FOR NCH CORPORATION

DATED: June 14, 2006

(Name) Michael J. Near

(Title) Regulatory Affairs Counsel

(Address) 2727 Chemsearch Blvd.

Irving, TX 75062

(972) 438-0005

Authorized to accept service of process